

No. 13115

United States
Court of Appeals
for the Ninth Circuit.

R. M. PERRIN and MARY PERRIN,

Appellants,

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Southern Division

FILED

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavits of:	
Dezendorf, James C.....	43
Hunt, Roy A.....	25
Perrin, R. M.....	26
Answer	21
Appeal:	
Bond for Costs on, Filed January 9, 1951.	35
Bond for Cost on, Filed August 25, 1951...	55
Clerk's Certificate to Record on.....	62
Notice of, Filed January 9, 1951.....	31
Notice of, Filed August 25, 1951.....	55
Order Extending Time Within Which to File Record and Docket.....	43
Bond for Costs on Appeal Filed January 9, 1951	35
Bond for Costs on Appeal Filed August 25, 1951	55
Bond on Removal.....	17

INDEX	PAGE
Clerk's Certificate to Record on Appeal.....	62
Complaint	3
Designation of Record.....	68
Docket Entries.....	59
Judgment on Mandate.....	48
Judgment Order.....	29
Letter of January 6, 1951, to the Clerk Enclosing Notice of Appeal and Bond on Appeal	34
Motion to Dismiss.....	28
Motion to Remand.....	23
Affidavit of Dezendorf, James C.....	24
Motion to Vacate.....	52
Notice of.....	51
Names and Addresses of Attorneys.....	1
Notice of Appeal Filed January 9, 1951.....	31
Notice of Appeal Filed August 25, 1951.....	55
Notice of Removal.....	20
Order Denying Motion to Remand and Enjoining Plaintiffs.....	27
Order Denying Motion to Vacate.....	53
Order of February 1, 1951, Extending the Time Within Which to File Record and Docket Appeal	43

INDEX	PAGE
Order of Removal.....	19
Petition for Removal.....	8
Affidavit of Thayer, C. S.....	13
Statement of Points Filed January 10, 1951...	32
Statement of Points Filed September 12, 1951.	58
Statement of Points Filed October 4, 1951....	67
Transcript of Proceedings February 1, 1951...	37

NAMES AND ADDRESSES OF ATTORNEYS

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Portland, Oregon.

METZGER, BLAIR, GARDNER & BOLDT,
523 Tacoma Bldg.,
Tacoma (2), Washington.

In the Superior Court of the State of Washington,
in and for Clark County

No.....

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, a Cor-
poration, and C. S. THAYER,

Defendants.

COMPLAINT

Come now plaintiffs and for cause of action
against defendants allege as follows:

I.

Defendant Aluminum Company of America, is
a corporation organized and existing under the
laws of the State of Pennsylvania and at all times
hereinafter mentioned was and is authorized to do
business in the State of Washington. Said de-
fendant since prior to January 1, 1947, has
operated an aluminum reduction factory near
Vancouver, Clark County, Washington.

II.

Defendant C. S. Thayer, was at all times herein
mentioned the manager of said aluminum reduction
factory and had supervision and control over the
operation of said plant.

III.

During the growing season of 1947, plaintiffs were occupying as lessees certain real property located at 80th Avenue and Columbia Boulevard in Multnomah County, Oregon, described as Tax Lot 110, Sec. 17, Township 1 North, Range 2 East of Willamette Meridian, and were engaged in the production of gladioli bulbs and flowers on approximately 27 acres of said property.

IV.

During said growing season, defendants with full knowledge of the injury and damage to be caused thereby and with full knowledge that the installation and operation of an effective gas fume and particulate collecting, washing and scrubbing system would prevent any damage to plaintiffs, knowingly and wilfully produced and deposited upon the property occupied by plaintiffs and upon the gladioli bulbs and flowers planted thereon various noxious gases, fumes and particulates.

V.

Said noxious gases, fumes and particulates so deposited upon the property occupied by plaintiffs and upon plaintiffs' gladioli caused material injury and damage to their gladioli bulbs and flowers and greatly diminished the value thereof, to plaintiffs' damage.

VI.

By reason of the matters hereinbefore alleged, plaintiffs have been damaged in the amount of

\$46,344.41, and thereby defendants by the force of Oregon Compiled Laws Annotated, Sec. 8-406 became liable to pay plaintiffs treble the amount of said damages.

VII.

Oregon Compiled Laws Annotated, Sec. 8-406 provides whenever any person, firm or corporation shall wilfully injure or sever from the land of another any produce thereof, or shall cut down, girdle or otherwise injure, or carry off, any tree, timber or shrub on the land of another person, or of the state, county, United States, or any public or private corporation, or on the street or highway in front of any person's house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, city, the United States, state, county, public or private corporation, against the person, firm or corporation committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed therefor, as the case may be; provided, that in any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the aforesaid mentioned acts, it shall be *prima facie* evidence that such acts were done and committed by defendant wilfully, intentionally and without plaintiff's consent. Oregon Compiled Laws An-

notated, Sec. 8-407 provides if, upon the trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages. Under Oregon law said statutes give to the party injured by the wrongful act of another, private remedy.

VIII.

Under Oregon law the acts of defendants hereinabove alleged create in plaintiffs a right of action against defendants for injuring personal property by direct force.

IX.

By reason of the foregoing plaintiffs are entitled to punitive damages in the amount of \$92,688.82, one-half of which sum is a reasonable amount to allow plaintiffs as attorneys' fees herein.

Wherefore, plaintiffs demand judgment against the defendants, and each of them, for thrice the amount of the damages suffered by them, for punitive damages in the amount of \$92,688.82, for at-

torneys' fees in the sum of \$46,344.41 and for costs and disbursements.

McLEAN & KLINGBERG,

DAVID E. McLEAN,

/s/ JUDSON T. KLINGBERG,
Of Attorneys for Plaintiffs.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

JAMES C. DEZENDORF,

ALFRED H. CORBETT,

Of Attorneys for Plaintiffs.

JOHN YERKOVICH,

Of Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed June 23, 1950.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1352

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, a Cor-
poration, and C. S. THAYER,

Defendants.

PETITION FOR REMOVAL

Petition for Removal of civil action from the Superior Court of the State of Washington in and for Clark County to the District Court of the United States for the Western District of Washington, Southern Division.

To the Honorable Judge of Said District Court of the United States:

Your petitioner, the defendant, Aluminum Company of America, above named, respectfully shows:

I.

That a civil action has been brought and is now pending in the Superior Court of the State of Washington in and for Clark County, a State Court, wherein R. M. Perrin and Mary Perrin are plaintiffs, and your petitioner, Aluminum Company of America, a corporation, and C. S. Thayer, are

defendants, which action is hereinafter referred to as "said action."

II.

That said action is a civil action of which the District Courts of the United States have original jurisdiction, in that said action is one to recover damages for alleged trespass to plaintiffs' property or the gladioli bulbs or flowers planted thereon alleged to have been caused by deposit of gas, fumes and particulates, emanating from defendant Aluminum Company of America's plant near Vancouver, Clark County, Washington, thereon.

III.

That the matter in controversy in said action at the commencement of said action and at the present time exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

IV.

That petitioner hereby petitions to remove said action to this Court upon the ground and for the reason that said action involves a controversy which is wholly between citizens of different states, in that plaintiffs, R. M. Perrin and Mary Perrin, were at the time of the commencement of said action and still are citizens and residents of the State of Oregon; that your petitioner, Aluminum Company of America, a defendant in said action, is a corporation organized and existing under the laws of the State of Pennsylvania and at the time of the commencement of said action was, and still is, a resident of the State of Pennsylvania.

V.

That the said plaintiffs have fraudulently and improperly joined defendant, C. S. Thayer, a resident of the State of Washington, as co-defendant with your petitioner for the sole purpose of avoiding and defeating the jurisdiction of the Courts of the United States and the right of your petitioner to remove this cause to said Court. That defendant, C. S. Thayer, is not now and never has been an officer of defendant corporation, Aluminum Company of America. That since September 17, 1940, defendant, Aluminum Company of America, has been and now is the owner and operator of an aluminum reduction plant near Vancouver, Clark County, Washington. That the design, plans, specifications, construction, alteration or modification of said plant at all times since September 17, 1940, have been and now are within the sole discretion, direction, control and scope of authority of the officers of defendant corporation, but are not and have not been within the discretion, direction, control and scope of authority of defendant, C. S. Thayer. That for more than three years prior to the commencement of said action, defendant, Aluminum Company of America, has at all times had installed and used the most modern and efficient system known to the industry for washing gases, particulates and fluorides from the air emanating from said plant, but that the design, development, construction and operation of such system have been and are solely within the control of the officers of said company, and are not within the control of the

defendant, C. S. Thayer. That the operation of said plant and its system for the prevention of escape of gases, particulates and any other matter are within the control and authority of the officers and directors of defendant, Aluminum Company of America, but are not now and never have been within the control and authority of the defendant, C. S. Thayer. That defendant, C. S. Thayer, has never directed any invasion of plaintiffs' property by authority of defendant, Aluminum Company of America, or otherwise, or by any act of his cause such invasion or consented thereto, or had any personal knowledge thereof or any control there-over. That petitioner is informed and believes, and therefore states, that these facts are well known to the plaintiffs herein. That plaintiffs have joined defendant, C. S. Thayer, as a defendant in said action solely in an endeavor to defeat the right of defendant, Aluminum Company of America, to remove said action to this Court. That the facts in connection therewith are all as more fully set forth in the affidavit of defendant, C. S. Thayer, hereto attached and by this reference made a part hereof.

VI.

The said action was commenced on the 7th day of June, 1950, by service of Summons and Complaint on petitioner.

VII.

Your petitioner herewith presents a good and sufficient bond, as provided by statute, conditioned that your petitioner will pay all costs and disburse-

ments incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, petitioner prays that the said action be removed from said State Court into this Court for trial and determination; that this Court accept said bond and make and enter an Order of Removal of said action.

ALUMINUM COMPANY
OF AMERICA,
Petitioner.

WILLIAM H. ECKERT,
FRANK L. SEAMANS,
HUGH L. BIGGS,
WILLIAM W. WYSE,
HILTON B. GARDNER,
Attorneys for Defendant, Aluminum Company of
America.

SMITH, BUCHANAN &
INGERSOLL,
HART, SPENCER,
McCULLOCH, ROCKWOOD
& DAVIES,
METZGER, BLAIR, GARDNER
& BOLDT,
Of Counsel.

State of Washington,
County of Pierce—ss.

Hilton B. Gardner, being first duly sworn, on oath, deposes and says: That your affiant is one of the attorneys for petitioner, and makes this verification for and on its behalf, being duly authorized so to do, upon the ground and for the reason that petitioner is a non-resident and no officer of said corporation is available to verify the same; that your affiant has read the foregoing Petition for Removal, and he believes it to be true.

/s/ HILTON B. GARDNER,

Subscribed and sworn to before me this 23rd day of June, 1950.

[Seal] /s/ JOHN W. BLAIR,
Notary Public in and for the State of Washington,
Residing at Tacoma.

AFFIDAVIT OF C. S. THAYER

State of Washington,
County of Pierce—ss.

C. S. Thayer, of lawful age, being first duly sworn, on his oath, deposes and says: That he is one of the defendants in an action entitled, "R. M. Perrin and Mary Perrin, Plaintiffs, vs. Aluminum Company of America, a corporation, and C. S. Thayer, Defendants," now pending in the Superior Court of the State of Washington in and for the County of Clark. That a copy of the Summons

and Complaint in said action was served upon affiant on the 7th day of June, 1950.

That affiant is not now and has not at any time in the past been an officer or director of defendant, Aluminum Company of America, a corporation. That since September 17, 1940, defendant Aluminum Company of America has been and is now the owner of and has operated and is now operating a manufacturing establishment near Vancouver, in Clark County, State of Washington, which plant has been and is being used by said defendant in the production of aluminum. That affiant had no control over the design or construction of said plant, but that said plant was designed and constructed in accordance with plans and specifications prepared by defendant, Aluminum Company of America, and approved by the officers of said company. That affiant was Works Manager of said plant from the time it started operations until he became Manager, Vancouver Operations, during the past year. That affiant, subject to the control and directions of the officers and directors of said Aluminum Company of America, manages said plant.

That prior to 1946, defendant, Aluminum Company of America, installed an elaborate system of water sprays in the ventilating roof monitors of said plant, which washed from the atmosphere the greater proportion of fluorides emitted from the reduction pots of said plant, and that at the time of the installation of such system, it was the most efficient known to the aluminum industry. That

throughout subsequent years, defendant, Aluminum Company of America, continuously sought to improve its air cleansing system, and at great expenditure of time, effort and money devoted to study, research and experimentation, it has developed a new and even more elaborate and efficient system, which system was installed at said plant during the years 1948 and 1949. Said system includes pot covers, rotoclones and air washing towers. By the installation of said system, the escape of particulates and gases from defendant's plant has been substantially eliminated. That said system is the most elaborate and efficient one so far developed and known to or used in the aluminum industry.

That defendants have never intended to damage plaintiffs' operations or to interfere in any degree whatsoever with plaintiffs' use and enjoyment of their property. The operation of said aluminum reduction plant has not been carried on for the purpose of invading any interest of plaintiffs in and to any of their property. That in fact defendants have not interfered with or invaded any interest in plaintiffs' property directly or indirectly, intentionally or otherwise, by the operation of said plant. That in the reduction of aluminum, some fluorides are necessarily created, and that a very small proportion of such matter unavoidably escapes into the atmosphere from said plant. Such escaping matter is not carried to and deposited on plaintiffs' property or at least not in significant quantities. Neither now nor at any time in the

past has any such matter injuriously affected or impaired the vitality, development, health or saleability of the property occupied by plaintiffs or of the gladioli bulbs and flowers planted thereon.

That the operation of said plant, its construction, alteration and modification, and any and all systems for the prevention of the escape of gases, particulates and other matter are within the control and authority of the officers and directors of defendant, Aluminum Company of America, and are not now and have never been within the control or authority of affiant. That affiant has never directed any invasion of plaintiffs' property or by any act of his caused such an invasion, or consented thereto, or had any personal knowledge thereof.

That affiant is informed and believes, and upon such information and belief states the fact to be, that the facts hereinabove set forth are, and at and prior to the commencement of the above-entitled action were, well known to plaintiffs, and that plaintiffs have joined affiant as a defendant in said action solely in the endeavor to defeat defendant, Aluminum Company of America's right to remove said action.

Further affiant sayeth naught, save and except that this affidavit is made in support of the petition of defendant, Aluminum Company of America, for the removal of said action from the Superior Court of the State of Washington in and for the County of Clark to the United States District Court

for the Western District of Washington, Southern Division.

/s/ C. S. THAYER.

Subscribed and sworn to before me this 23rd day of June, 1950.

[Seal] /s/ JOHN W. BLAIR,
Notary Public in and for the State of Washington,
Residing at Tacoma.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Men by These Presents that we, Aluminum Company of America, a Pennsylvania corporation, as Principal, and Hartford Accident and Indemnity Company, of Hartford, Connecticut, a Connecticut corporation, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto R. M. Perrin and Mary Perrin, the plaintiffs in the above-entitled cause, their heirs, personal representatives, successors and assigns, in the penal sum of One Thousand Dollars (\$1,000.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 23rd day of June, 1950.

The conditions of this obligation are such that whereas, the said Aluminum Company of America has filed its petition in the United States District Court in and for the Western District of Washington, Southern Division, for removal of the above cause to said Court from the Superior Court of the State of Washington in and for Clark County;

Now, Therefore, if the said Aluminum Company of America shall well and truly pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed, then this obligation to be void; otherwise to remain in full force and effect.

ALUMINUM COMPANY OF
AMERICA,

By /s/ HILTON B. GARDNER,
Its Attorney.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY of Hartford, Connecticut,

By /s/ [Indistinguishable],
Its Attorney in Fact.

Approved and Accepted this 23 day of June, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

ORDER OF REMOVAL

This matter coming on for hearing this . . . day of June, 1950, before the undersigned Judge of the above-entitled Court, upon the petition of defendant, Aluminum Company of America, for an Order of Removal herein, and it appearing from said petition that said removal is proper, and the Court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the action entitled, "R. M. Perrin and Mary Perrin, Plaintiffs, vs. Aluminum Company of America, a corporation, and C. S. Thayer, Defendants," now pending in the Superior Court of the State of Washington in and for the County of Clark, be and the same hereby is ordered removed to this Court for trial and determination, and

It Is Further Hereby Ordered that the bond on removal submitted to the Court with said petition be and the same hereby is approved and accepted.

Done in Open Court this 23 day of June, 1950.

/s/ CHARLES H. LEAVY,

United States District Judge.

Presented by:

/s/ HILTON B. GARDNER,

Of Attorneys for Defendant, Aluminum Company of America.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

NOTICE OF REMOVAL

To R. M. Perrin and Mary Perrin, Plaintiffs, and to McLean & Klingberg, David E. McLean, Judson T. Klingberg, Koerner, Young, McCulloch & Dezendorf, James C. Dezendorf, Alfred H. Corbett, and John Yerkovich, their attorneys:

You, and Each of You, will please take notice that on the 23 day of June, 1950, defendant, Aluminum Company of America, filed in the District Court of the United States for the Western District of Washington, Southern Division, its Petition for Removal of the above-entitled case from the Superior Court of the State of Washington in and for the County of Clark to the above-entitled court, together with its Bond for Removal.

Copies of said Petition and Bond are herewith served upon you.

Dated this 23 day of June, 1950.

WILLIAM H. ECKERT,

FRANK L. SEAMANS,

HUGH L. BIGGS,

WILLIAM W. WYSE,

HILTON B. GARDNER,

Attorneys for Defendant, Aluminum Company of America.

Receipt of copy acknowledged.

[Endorsed]: Filed June 26, 1950.

[Title of District Court and Cause.]

ANSWER

For answer to plaintiffs' complaint defendants admit, deny and allege as follows:

I.

Defendants admit the allegations contained in paragraphs I and VII of plaintiffs' complaint.

II.

Answering paragraph II of plaintiffs' complaint, defendants allege that defendant C. S. Thayer was works manager of the reduction works of defendant Aluminum Company of America at Vancouver, Washington, between August 10, 1940, and on or about July 1, 1949, and that since on or about July 1, 1949, he has been the manager of Vancouver operations of defendant Aluminum Company of America. In said capacities he has exercised general supervision and control over some particulars of the operation of said reduction works. Defendants deny the allegations of paragraph II of plaintiffs' complaint except insofar as the same are consistent with defendants' allegations contained herein.

III.

Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph III of plaintiffs' complaint.

IV.

Defendants deny the allegations contained in paragraphs IV, V, VI, VIII and IX of plaintiffs' complaint.

First Affirmative Defense

Defendants allege that plaintiffs' action is barred by the statute of limitations.

Second Affirmative Defense

Defendants allege that the action set forth in plaintiffs' complaint is a local action and that this court lacks jurisdiction of the same.

Wherefore, defendants demand that this action be dismissed and that they have their costs and disbursements incurred herein.

WILLIAM H. ECKERT,

FRANK L. SEAMANS,

HUGH L. BIGGS,

WILLIAM W. WYSE,

HILTON B. GARDNER.

Certificate of Mailing attached.

[Endorsed]: Filed June 29, 1950.

[Title of District Court and Cause.]

MOTION TO REMAND

Comes now the plaintiffs and upon the basis of (1) the facts alleged in the accompanying affidavit of James C. Dezendorf, hereto attached and made a part hereof, and (2) the record and files herein move this Court to remand this cause to the Superior Court of the State of Washington, for Clark County, from which Court it was attempted to be removed to this Court, for the following reasons:

(1) The requisite diversity of citizenship required as a condition precedent to the jurisdiction of this court in a controversy of the character presented by the record in this cause does not exist.

(2) An action in which a resident defendant is a proper party may not be removed; the defendant C. S. Thayer is properly joined; he was served with process prior to the filing of the petition to remove and is a citizen and resident of the State of Washington.

(3) No separate independent claim is stated against either defendant so that neither of them can remove all or any part of this suit or action.

(4) For other reasons apparent upon the face of the record.

Wherefore, plaintiffs pray that this cause may be remanded to the Superior Court of the State of Washington, for Clark County to be there pro-

ceeded with according to the practice governing such cases.

McLEAN & KLINGBERG,

/s/ DAVID E. McLEAN,
Of Attorneys for Plaintiffs.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
/s/ [Indistinguishable),
Of Attorneys for Plaintiffs.

/s/ JOHN YERKOVICH,
Of Attorneys for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. DEZENDORF

State of Oregon,
County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say:

That I am one of the attorneys for plaintiffs in the above action, that the defendant C. S. Thayer resides in Vancouver, Clark County, Washington, and I am informed and believe and therefore assert that he is a citizen of the State of Washington;

That the defendant C. S. Thayer is the Manager of the Vancouver, Washington, ALCOA Reduction Plant being operated by defendant Aluminum Com-

pany of America, and as such Manager the said C. S. Thayer has the supervision and control of the operation thereof and has the right, authority and power to stop the operation of said plant, either wholly or in part.

/s/ JAMES C. DEZENDORF.

Subscribed and sworn to before me this 3rd day of July, 1950.

/s/ VERA SCALES,

Notary Public for Oregon.

My Commission expires 11-6-53.

Certificate of Mailing attached.

[Endorsed]: Filed July 5, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF ROY A. HUNT

Before me, the undersigned authority, personally appeared Roy A. Hunt, who being by me first duly sworn according to law, did depose and say that he is President of the Aluminum Company of America, one of the defendants in the above-entitled action and duly authorized to make this affidavit in its behalf;

That C. S. Thayer, the other defendant in the above-entitled action, does not have, and never has had, the right, authority or power to stop the operation of the defendant's plant near Vancouver, Clark County, Washington;

And that the only person who would have such authority is the affiant himself, as President of the defendant Company acting with the concurrence of Irving W. Wilson, Senior Vice President of said Company, or of Frank L. Magee, Operating Vice President of said Company.

/s/ ROY A. HUNT.

Sworn to and subscribed before me this 10th day of July, 1950.

/s/ JOHN J. DEMSKIE,
Notary Public.

My Commission expires March 7, 1951.

[Endorsed]: Filed July 13, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF R. M. PERRIN

State of Oregon,
County of Multnomah—ss.

I, R. M. Perrin, being duly sworn, depose and say:

That I am a plaintiff in an action instituted in the Superior Court of the State of Washington in and for Clark County by myself and Mary Perrin against Aluminum Company of America and C. S. Thayer.

That Mary Perrin is my mother and that she has an interest in said action.

That Mary Perrin is now, and has, for more than three years, been a resident and citizen of the State of Washington with permanent residence at 5501 N. E. 36th Street, Seattle, Washington.

/s/ R. M. PERRIN.

Subscribed and sworn to before me this 14th day of July, 1950.

[Seal] /s/ HERBERT H. ANDERSON,
Notary Public for Oregon.

My Commission expires Jan. 15, 1954.

[Endorsed]: Filed July 17, 1950.

[Title of District Court and Cause.]

**ORDER DENYING MOTION TO REMAND
AND ENJOINING PLAINTIFFS**

This cause coming on to be heard at this term and being argued by counsel, upon consideration thereof, it is

Ordered, Adjudged and Decreed that the motion of plaintiffs to remand this cause to the Superior Court of the State of Washington in and for Clark County be and the same is hereby denied, and

Upon motion of plaintiffs, It Is Further Ordered, Adjudged and Decreed that plaintiffs, their agents and attorneys, be and they hereby are restrained and enjoined from further prosecuting this action

in the Superior Court of the State of Washington in and for Clark County, to which plaintiff excepts and exception allowed.

Dated Sept. 18, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendants move the Court for an order dismissing plaintiffs' action and entering judgment for defendants for their costs, on the ground that the pleadings disclose that the plaintiffs' action is barred by the statute of limitations.

WILLIAM H. ECKERT,
FRANK L. SEAMANS,
HUGH L. BIGGS,
WILLIAM W. WYSE,
HILTON B. GARDNER.

[Endorsed]: Filed October 20, 1950.

The United States District Court for the Western
District of Washington, Southern Division

Civil No. 1352

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA and C.
S. THAYER,

Defendants.

JUDGMENT ORDER

This cause regularly came on for hearing on defendants' motion for an order dismissing this action and entering judgment for defendants for their costs on the ground that the pleadings disclose that the plaintiffs' action is barred by the statute of limitations. Plaintiffs appeared by one of their attorneys, James C. Dezendorf; defendants appeared by one of their attorneys, Hilton B. Gardner.

The Court having fully and carefully considered the pleadings, record, briefs and proceedings on the arguments of the motion, concludes that this action was not commenced within the time prescribed by the applicable statute of limitations and therefore should be dismissed with judgment against plaintiffs for defendants' costs in accordance with defendants' motion, and now being fully advised makes the following judgment order:

It Is Considered, Ordered and Adjudged that

this action be and the same hereby is dismissed and that the defendants be and they hereby are granted judgment against plaintiffs for defendants' costs and disbursements incurred herein, taxed at \$15.00.

Done and dated in open court this 8th day of December, 1950.

Exceptions allowed to plaintiff.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved as to form:

/s/ JAMES A. DEZENDORF,
Of Attorneys for Plaintiffs.

Presented by:

/s/ HILTON B. GARDNER.

Entered December 8, 1950.

[Endorsed]: Filed December 8, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Aluminum Company of America and C. S.
Thayer, defendants above named; and

To William H. Eckert, Frank L. Seamans, Hugh
L. Biggs, William W. Wyse, Hilton B. Gardner,
of their attorneys:

Notice is hereby given that R. M. Perrin and
Mary Perrin, plaintiffs above named, appeal to
the Court of Appeals for the Ninth Circuit from
the order entered in this action on September 18,
1950, and from the judgment order entered in this
action on December 8, 1950.

Dated January 6, 1951.

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

Attorneys for Appellants.

Copies mailed Jan. 10, 1951.

[Endorsed]: Filed January 9, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellants intend to rely on this appeal are as follows:

(1) The court erred in denying plaintiffs' motion to remand this cause to the Superior Court of the State of Washington for Clark County, from which court it was attempted to be removed by defendant Aluminum Company of America.

(2) The court erred in dismissing this action on the ground that the pleadings disclose the action is barred by the Statute of Limitations.

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

Appellants' Attorneys.

State of Oregon,

County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say: That I am one of attorneys for plaintiffs in the within action; that I served the within Statement of Points upon defendants' attorneys by causing to be deposited in the post office at Portland, Multnomah County, Oregon, on

the 9th day of January, 1950, an envelope, with postage prepaid, addressed to Metzger, Blair, Gardner & Boldt, defendants' attorneys, at their post office address, 523 Tacoma Building, Tacoma, Washington; that said envelope contained a copy of the within Statement of Points, same having been duly certified to by me to be a true and correct copy of the original.

/s/ JAMES C. DEZENDORF.

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ OGLESBY H. YOUNG,
Notary Public for Oregon.

My commission expires Jan. 2, 1954.

[Endorsed]: Filed Jan. 10, 1951.

Koerner, Young, McColloch & Dezendorf
Attorneys at Law
800 Pacific Building
Portland 4, Oregon

January 6, 1950

Clerk of the United States District Court,
For the Western District of Washington,
Southern Division,
Federal Courthouse and Post Office Building,
Tacoma, Washington.

Re: Perrin v. Aluminum Company of Amer-
ica Number 1352.

Dear Sir:

Enclosed herewith for filing are Notice of Appeal in the above case and Bond for Costs on Appeal.

Enclosed also are copies thereof so that you may give notice to the defendants of the filing thereof.

The Bond for Costs on Appeal has been served upon defendants' attorneys in accordance with the certificate attached to the original bond.

Very truly yours,

/s/ JAMES C. DEZENDORF.

cc—Metzger, Blair, Gardner & Boldt, Attorneys at Law, Tacoma Building, Tacoma, Washington.
Hart, Spencer, McCulloch, Rockwood & Davies, Attorneys at Law, 1410 Yeon Building, Portland 4, Oregon.

[Stamped]: Received Jan. 9, 1951, Office of Clerk, U. S. District Court.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, R. M. Perrin and Mary Perrin, as principals, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Aluminum Company of America and C. S. Thayer in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Aluminum Company of America and C. S. Thayer, their successors, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of January, 1951.

Whereas, on September 18, 1950, and on December 8, 1950, in an action depending in the United States District Court for the Western District of Washington, Southern Division, between R. M. Perrin and Mary Perrin as plaintiffs and Aluminum Company of America and C. S. Thayer as defendants, an order and a judgment order, respectively, were entered against the said R. M. Perrin and Mary Perrin and the said R. M. Perrin and Mary Perrin having filed a notice of appeal from such order and from such judgment order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such, that

if the said R. M. Perrin and Mary Perrin shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the order and judgment order are affirmed, or such costs as the said Court of Appeals may award against the said R. M. Perrin and Mary Perrin if the judgment is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

R. M. PERRIN, and

MARY PERRIN,

Appellants.

By /s/ JAMES C. DEZENDORF,

Of Attorneys for Appellants.

FIDELITY & DEPOSIT

COMPANY OF MARYLAND,

By /s/ CLARENCE D. PORTER,

Attorney in Fact.

Countersigned at Vancouver, Washington.

By /s/ P. M. ELWELL,

Resident Agent.

Certificate of Mailing attached.

[Endorsed]: Filed January 9, 1951.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1352

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, and
C. S. THAYER,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Transcript of Ex Parte proceedings had in the
above-entitled and numbered cause, in the above-
entitled court, before the Honorable Charles H.
Leavy, United States District Judge, at Tacoma,
Washington, on the 1st day of February, 1951.

Appearances:

JAMES C. DEZENDORF, ESQ., of

KOERNER, YOUNG, McCOLLOCH and
DEZENDORF,

800 Pacific Building,
Portland 4, Oregon,

Appeared for Plaintiffs;

HILTON B. GARDNER, ESQ., of
METZGER, BLAIR, GARDNER, and
BOLDT,

Tacoma Building,
Tacoma, Washington,

Appeared on Behalf of Defendants.

The Court: Are there any *ex parte* matters now before we take up the call of the calendar?

Mr. Dezendorf: If it please the Court, in the matter of Perrin vs. Aluminum Company of America, Number 1352, I have asked Mr. Gardner to appear here this morning in connection with a motion to extend the time for filing the record and documents in appeal which I would like to present to the Court at this time.

As the Court knows, under the rules the District Court has the right to extend the time for docketing the appeal in the Circuit Court of Appeals within a period of ninety days within the filing of notice of appeal.

I am asking for an order extending the time within which to file and docket the appeal to April 2, 1951. The reason for the request is that we are engaged now, and will be continually engaged, in the trial of cases in our Court in Portland until approximately the first of April and we would like the Court's consideration in giving us the additional time.

After the motion was prepared I was advised by counsel for the Aluminum Company that the notice of appeal was not filed by the Clerk of this Court

until the 9th day of January, 1951. In that connection the notice of appeal and bond were mailed by me at the main post office in Portland, Oregon, at ten minutes past twelve (12:10) on Saturday, January 6, 1951.

As the Court probably knows, there are four trains a day carrying mail from Portland to Tacoma and points north. The latest time that the notice of appeal should have arrived in the Post Office in Tacoma was Sunday, January 7th. In inquiring at the Clerk's Office, I have been unable to find any reason why the notice of appeal and bond were not received and filed on Monday, January 8th. There is, however, one possible explanation which was given to me by the Deputy Clerk this morning, which is that the Clerk's Office does not always pick up the mail in the afternoon from the box in the Post Office. That could have accounted for the fact that the notice of appeal and bond might have come in and have been placed in the box on Monday afternoon, January 8th, but was not actually picked up by the Clerk on that afternoon.

I have——

The Court: Well, is January 9th beyond the time fixed for appeal?

Mr. Dezendorf: It may be. The judgment was docketed on the 8th day of December, 1950.

The Court: Yes, it would be.

Mr. Dezendorf: I take it, however, that the question as to whether the notice of appeal was timely filed will probably be ruled on by the Court of Appeals probably on either a motion to dismiss

the appeal filed by the Respondent, or when the Court tests its own jurisdiction to hear the questions attempted to be raised by the appeal.

The Court: There is nothing in this record to support your statement, that is, by way of an affidavit or pleading, is there?

Mr. Dezendorf: There is the certificate of service which appears on the bond. I did not know that this question was involved until just a day or two ago and, therefore, I did not designate for an inclusion in the record on appeal the bond on appeal. It is my intention to now file a supplementary declaration designating the original bond on appeal and the record on this hearing in the hope that that will put the facts before the Appellate Court.

Mr. Gardner: I have nothing to add, your Honor, to what Mr. Dezendorf said except this: That it is our intention to move for dismissal of this appeal and, in the event the Court, in the exercise of its discretion, permits the additional time for the filing of the record, it is further our intention to take it up on short record with a motion for dismissal prior to the expiration of that time so that the question may be determined.

The Court: Mr. Clerk, you have no independent recollection of——

The Clerk: No, your Honor, I don't. If it had been in the box down there on Monday morning it would have borne the file date of the 8th and as we said, there is a possibility that it could have come in during Monday and we do not make a practice of going down every day. Usually we do,

but there is a possibility that the mail wasn't picked up in the afternoon. In fact, there is hardly ever any mail in the afternoon and that is why we don't go down. But, if it did come in Monday afternoon, it was opened Tuesday—it would have been in our Tuesday mornings' mail, and that is when it was opened. If it had been in the box Monday morning, it would have been filed as of Monday.

The Court: You don't have the envelope?

The Clerk: No, we didn't realize that time was involved until Mr. Gardner came in a couple of days after that; and we filed it on the 9th. We didn't realize that the time was so close.

The Court: Generally, I want to state that it is very important that you pick up your mail twice a day and see that these documents get in the record as timely as possible because of the very situation that we have here now. I don't think that I am called upon to determine the question of whether notice of appeal has been timely served. However, I think I shall grant your extension. I think to do otherwise under the statement here would be assuming an authority that I perhaps haven't got.

I can see how this question might arise again in the Appellate Court and granting this extension, I do it with the distinct understanding that it shall not stop the Defendants from raising the issue again in the Appellate Court, and, doubtless, there will be proof in the form of affidavits concerning the mailing of the notice and concerning the time it

should have been received. If it were received on the 8th it is granted it is timely. Is that right, Mr. Gardner?

Mr. Gardner: I believe that is right.

The Court: Or, if the failure to file were due to some fault on the part of the Clerk, it is doubtless that that rule permits the finding that it was timely filed if it actually came to the Clerk's Office on the 8th. But, I am not going to determine that. I think I shall just grant the extension with the understanding that it does not prejudice the Defendant in raising that issue in the Appellate Court.

Mr. Dezendorf: Thank you, your Honor.

(Whereupon, other matters were considered.)

Certificate

I, Earl V. Halvorson, official reporter for the within-entitled court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed February 13, 1951.

[Title of District Court and Cause.]

ORDER

Based upon the appellants' motion heretofore filed herein and the court being fully advised,

It Is Hereby Ordered that the time within which the Record on Appeal herein may be filed and the appeal docketed in the Court of Appeals be and the same hereby is extended to April 2, 1951.

Dated at Tacoma, Washington, this 1st day of February, 1951.

/s/ CHARLES H. LEAVY,
District Judge.

[Endorsed]: Filed February 1, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. DEZENDORF

State of Oregon,
County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say:

That I am one of the attorneys for plaintiffs-appellants in this action; that I prepared the notice of appeal and bond on appeal in this action on Saturday morning, January 6, 1951; that after the bond was executed by the surety company, I wrote a letter to the Clerk of the United States District Court for the Western District of Washington,

Southern Division, with which I enclosed the original notice of appeal and copies for use by the Clerk in notifying the attorneys for the defendants of the filing of the notice of appeal, and I attached a certificate of service of the bond to the original bond on appeal;

That I enclosed the letter to the clerk, the original and copies of the notice of appeal and the original bond on appeal in an envelope, properly addressed to the Clerk of the United States District Court for the Western District of Washington, Southern Division, United States District Court House and Post Office Building, Tacoma, Washington, and I personally placed on said envelope more than the required amount of stamps to insure the delivery of said envelope to the Clerk at Tacoma, and at 12:10 p.m. on Saturday, January 6, 1951, I personally deposited said envelope in the mail chute at the Main Post Office in Portland, Oregon; that at the same time, I also deposited in said mail chute a carbon copy of said letter of January 6 to the Clerk, together with a certified copy of bond on appeal, which copies were contained in an envelope with proper postage stamps attached addressed to Metzger, Blair, Gardner & Boldt, Tacoma counsel for defendants-respondents, Tacoma Building, Tacoma, Washington;

That thereafter, I received a letter from the Deputy Clerk of the United States District Court for the Western District of Washington, Southern Division, acknowledging receipt of the notice of appeal and bond on appeal, but the date of receipt was not mentioned in the letter;

That approximately two weeks ago I was advised by the Portland counsel for the defendants-respondents that the copy of the notice of appeal which they had received bore the filing date of January 9, 1951, which was the Tuesday following Saturday, January 6, 1951, on which date the notice of appeal and bond on appeal had been mailed to the Clerk at Tacoma;

That immediately after being advised that the copy of the notice of appeal bore the filing date of January 9, 1951, I talked with the Superintendent of Mails at the Main Post Office in Portland, Oregon, and I was advised by him that the letter containing the notice of appeal and bond which I mailed at the Main Post Office on Saturday, January 6, 1951, at 12:10 p.m., should have been placed on board Train 459, which left Portland for Tacoma and Seattle at 5 p.m. on said date, and that it should have arrived at the main post office in Tacoma at approximately 8 p.m. on Saturday, January 6, 1951;

That the Superintendent of Mails at Portland advised me further that there are five northbound trains a day which carry mail to Tacoma, which leave Portland as follows:

Train Number 457	Departure Time 8:00 a.m.
403	8:30 a.m.
407	10:00 a.m.
459	5:00 p.m.
401	11:30 p.m.

That the Superintendent of Mails at Portland

further advised me that the dispatching department of the Main Post Office operates 24 hours a day, 7 days a week, and that this department handles the transmission of mail from the letter drops at the Main Post Office to the trains departing from the railroad station in Portland;

That on February 1, 1951, I talked with the Superintendent of Mails at the Main Post Office in Tacoma, Washington, and I was advised by him that mail arriving in Tacoma on Train 459 from Portland was received at the post office at approximately 8 p.m.; that mail arriving from Portland on Trains 457, 403 and 407 arrived at the post office at 2:30 p.m., and that mail arriving in Tacoma from Portland on Train 401 arrives at the post office at 6 a.m.; that the office of the Clerk of the United States District Court for the Western District of Washington, Southern Division, has a post office box in the main post office in Tacoma into which all arriving mail is immediately deposited;

That on Thursday, February 1, 1951, I talked to E. E. Redmayne, Deputy Clerk of the United States District Court for the Western District of Washington, Southern Division, at the Clerk's office in the main post office building in Tacoma, Washington, and inquired when the notice of appeal and bond on appeal in this action, which were enclosed with my letter of January 6, 1951, were received; that I was informed that they must have arrived at the Clerk's office on Tuesday, January 9, 1951, since that is the date they were filed; that

I was further informed that while mail is deposited in the Clerk's post office box in the main post office several times each day, the Clerk's office has been in the habit of only picking up the mail deposited in said post office box in the morning, and that if my letter of January 6 enclosing the notice of appeal and bond on appeal had been placed in the Clerk's post office box after the mail was first picked up on the morning of Monday, January 8, 1951, it would not have been picked up until the next morning, which was Tuesday, January 9, 1951.

/s/ JAMES C. DEZENDORF.

Subscribed and sworn to before me this 3rd day of February, 1951.

[Seal] /s/ J. ELLIOTT BUSEY,
Notary Public for Oregon.

My Commission expires Dec. 25, 1953.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 14, 1951.

In the United States District Court for the Western
District of Washington, Southern Division
Civil No. 1352

R. M. PERRIN and MARY PERRIN,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Defendants.

JUDGMENT ON MANDATE

This cause came on regularly for hearing upon motion of defendants for judgment upon mandate of the United States Court of Appeals for the Ninth Circuit, and it appearing to the Court that on the 14th day of May, 1951, the United States Court of Appeals for the Ninth Circuit did issue its mandate, which was entered of record herein on the 17th day of May, 1951, in words and figures substantially as follows:

“United States of America—SS:

“THE PRESIDENT OF THE UNITED
STATES OF AMERICA

“To the Honorable, the Judges of the United States District Court for the Western District of Washington, Southern Division, Greeting:

“Whereas, lately in the United States District Court for the Western District of Washington, Southern Division, before you or some of you, in a cause between R. M. Perrin and Mary Perrin, plaintiffs and Aluminum Company of America and C. S. Thayer, defendants, No. 1352, a judgment order was duly filed and entered on the 8th day of December, 1950, which said judgment order is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof;

“And Whereas, the said R. M. Perrin, et al., appealed to this court as by the inspection of the

transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

“And Whereas, on the 9th day of April, in the year of our Lord, one thousand nine hundred and fifty-one, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and upon motion of appellee for dismissal of appeal herein and was duly submitted:

“On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be, and hereby is granted and that the appeal in this cause be, and hereby is, dismissed. (April 9, 1951.)

“(On Reverse Side)

“You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

“Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the fourteenth day of May in the year of our Lord one thousand nine hundred and fifty-one.

“[Seal] /s/ PAUL P. O'BRIEN,

“Clerk, United States Court of Appeals for the Ninth Circuit.”

“United States Court of Appeals
for the Ninth Circuit

“No. 12890

“R. M. PERRIN, et al.,

“vs.

“ALUMINUM COMPANY OF AMERICA.

“MANDATE

“Let the within Mandate be entered this 17th day of May, 1951.

“/s/ C. E. BEAUMONT,

“United States District Judge.

“[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, May 17, 1951.

“MILLARD P. THOMAS,

“Clerk.

“By E. R.,

“Deputy.”

Now, Therefore, pursuant to and in accordance with said mandate, it is hereby

Considered, Ordered and Adjudged that the appeal from the judgment of this court entered on the 8th day of December, 1950, having been dismissed, said judgment is in all matters and things affirmed.

Done and dated at Tacoma, Washington, this 8th day of June, 1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved as to Form:

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiffs..

Presented by:

HILTON B. GARDNER,
Of Attorneys for Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed June 8, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Aluminum Company of America and C. S. Thayer, defendants; and William H. Eckert, Frank L. Seamans, Hugh L. Biggs, William W. Wyse and Hilton S. Gardner, their attorneys:

Please Take Notice that the undersigned will bring the above motion to vacate order and to remand on for hearing before this Court in the United States Court House in the City of Tacoma, Washington, on the 23rd day of July, 1951, at 9:30

o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

/s/ JOHN YERKOVICH,

McLEAN & KLINGBERG,
Attorneys for Plaintiffs.

To the Clerk of the United States District Court
for the Western District of Washington, Southern
Division:

Please set the foregoing motion to vacate order
and remand for hearing at 9:30 o'clock a.m. on the
23rd day of July, 1951.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause.]

MOTION TO VACATE

Plaintiffs move the court to vacate and set aside the order entered in this action on September 18, 1950, denying plaintiffs' motion to remand, to vacate and set aside the judgment entered in this

action on December 8, 1950, and to vacate and set aside the judgment entered in this action on June 8, 1951, and to remand this case to the Superior Court of the State of Washington in and for Clark County.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

/s/ JOHN YERKOVICH,

McLEAN & KLINGBERG,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO VACATE

The above-entitled action having come on regularly for hearing before the above-entitled Court on the 1st day of August, 1951, upon plaintiffs' motion to: (a) vacate and set aside the order entered in the above-entitled action on September 18, 1950, denying plaintiffs' motion to remand; (b) vacate and set aside the judgment entered in the above-entitled action on December 8, 1950; (c) vacate and set aside the judgment entered in the above-entitled action on June 8, 1951; and (d) remand the above-entitled action to the Superior Court of the State of Washington in and for Clark

County; the plaintiffs appearing by Herbert H. Anderson, of their attorneys of record, and the defendants appearing by Hugh L. Biggs and Hilton B. Gardner, of their attorneys of record; and the Court having heard the argument of counsel and having considered said motion, and being fully advised in the premises,

Now, Therefore, It Is Ordered, Adjudged and Decreed that the motion of plaintiffs to: (a) vacate and set aside the order entered in the above-entitled action on September 18, 1950, denying plaintiffs' motion to remand; (b) vacate and set aside the judgment entered in the above-entitled action on December 8, 1950; (c) vacate and set aside the judgment entered in the above-entitled action on June 8, 1951; and (d) remand the above-entitled action to the Superior Court of the State of Washington in and for Clark County, be and the same, and each and every part thereof, is hereby denied.

To which action of the Court, plaintiffs except, and the exception is allowed.

Dated this 3rd day of August, 1951.

/s/ J. FRANK McLAUGHLIN,
United States District Judge,
Sitting by Assignment.

Presented by:

/s/ HILTON B. GARDNER,
Of Attorneys for Defendants.

[Endorsed]: Filed August 3, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Aluminum Company of America and C. S. Thayer, defendants above named; and

To William H. Eckert, Frank L. Seamans, Hugh L. Biggs, William W. Wyse, Hilton B. Gardner, of their attorneys:

Notice is hereby given that R. M. Perrin and Mary Perrin, plaintiffs above named, appeal to the Court of Appeals for the Ninth Circuit from the Order entered in this action on August 3, 1951.

Dated this 23rd day of August, 1951.

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH,

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

Attorneys for Appellants.

Copies Mailed Aug. 27, 1951.

[Endorsed]: Filed August 25, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, R. M. Perrin and Mary Perrin, as principals, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Aluminum Company of America and C. S. Thayer in the full and just sum of Two Hundred Fifty (\$250.00) Dollars to be paid to the said Aluminum Company of America and C. S. Thayer, their successors, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of August, 1951.

Whereas, on August 3, 1951, in an action depending in the United States District Court for the Western District of Washington, Southern Division, between R. M. Perrin and Mary Perrin as plaintiffs and Aluminum Company of America and C. S. Thayer as defendants, an Order was entered against the said R. M. Perrin and Mary Perrin and the said R. M. Perrin and Mary Perrin having filed a notice of appeal from such Order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such, that if the said R. M. Perrin and Mary Perrin shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the Order is affirmed,

or such costs as the said Court of Appeals may award against the said R. M. Perrin and Mary Perrin if the Order is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

R. M. PERRIN, and

MARY PERRIN,

Appellants.

By /s/ HERBERT H. ANDERSON,
Of Attorneys for Appellants.

[Seal] FIDELITY & DEPOSIT COM-
PANY OF MARYLAND,

By /s/ JEAN J. KAMSTRA,
Attorney in Fact.

Countersigned at Vancouver, Washington.

P. M. ELWELL AGENCY,

By /s/ P. M. ELWELL,
Resident Agent.

Certificate of Mailing attached.

[Endorsed]: Filed August 25, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS .

The points upon which appellant intends to rely on this appeal are as follows:

The court erred in denying plaintiffs' motion (1) to vacate and set aside the order entered in this action on September 18, 1950; (2) to vacate and set aside the judgment entered in this action on December 8, 1950; and (3) to vacate and set aside the judgment entered in this action on June 8, 1951, and in refusing to remand this case to the Superior Court of the State of Washington in and for Clark County.

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH,

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

Appellants' Attorneys.

Receipt of Copy acknowledged. .

[Endorsed]: Filed September 12, 1951.

[Title of District Court and Cause.]

TRANSCRIPT OF DOCKET ENTRIES

1950

June 23—Filed Pet. for Removal from Sup. Ct.,
Clark Co.—(1)

June 23—Filed Bond on Removal (\$1000)—(2)

June 23—Filed Order of Removal—(3)

June 23—Filed Sum. & Complaint (from Sup. Ct.)
(4)

June 23—Filed Notice of Removal—(5)

June 29—Filed Answer—(6)

July 5—Filed Motion, Pltf., to Remand—(7)

July 5—Filed Notice—(8)

July 5—Set for trial Dec. 5 (Court)

July 13—Filed Affid., Roy A. Hunt, Pres. of deft.
corp.—(9)

July 17—Filed Affid., R. M. Perrin—(10)

July 17—Motion Remand passed 1 wk.

July 31—Filed Pltfs.' Memo re Motion Remand—
(11)

July 31—Ent'd record hearing Motion Remand—
denied; written order requested.

Sept. 18—Ent'd record hearing oral Motion to in-
clude injunc. relief in Order Deny. Motion
to Remand—granted.

Sept. 18—Filed and Ent. Order Deny. Motion Re-
mand and Enjoin. Pltfs. from prosec.
action in Sup Ct. (COB 10, 1234)—(12)

Oct. 20—Filed Motion, defts., to Dismiss, with costs
to defts.—(13)

Nov. 10—Filed Defts.' Memo re Stat. of Limit.
—(14)

1950

- Nov. 10—Filed Note of Issue (Hear. Defts' Mot. for Judgm) (11/20)—(15)
- Nov. 10—Filed Affid. service—(16)
- Nov. 18—Filed Plfts'. Memorandum on Statute of Limitations—(17)
- Nov. 20—Ent'd record hearing Motion, defts., to Dismiss-sustained; exception allowed.
- Nov. 27—Filed Reporter's Transcript of Hearing (11/20/50)—(18)
- Dec. 8—Filed & Ent. Judgm. Order: Action dismissed; defts. to recover costs \$15 (COB 11, 179)—(19)

1951

- Jan. 9—Filed Motion, Pltfs., of Appeal—Copies sent counsel for defts—(20)
- Jan. 9—Filed Bond for Costs on Appeal—(21)
- Jan. 10—Filed Statement of Points—(22)
- Jan. 10—Filed Designation of Record, Pltfs.—(23)
- Jan. 17—Filed Designation of Addl. Portions of Record (Defts.)—(24)
- Jan. 17—Filed Reporter's Transcript (of 11/20/50) (same as Item 18 supra)—(25)
- Feb. 1—Filed Motion, Plft., extend time file appeal—(26)
- Feb. 1—Filed & Ent. Order Extend Time (to 4/2/51) to File Record on Appeal (COB 11, 280)—(27)
- Feb. 14—Filed Affid. Dezendorf—(28)
- Feb. 14—Filed Designation, defts., of Addl. Portions of Record—(29)

1951

- Feb. 13—Reporter's Transcript of Proceedings (of 2/1/51)—(30)
- Feb. 19—Filed Designation, defts., of Contents of Record on Appeal (per Rule 75j FRCP)—(31)
- Feb. 19—Filed Designation, Pltfs., of Addl. Portions of Record for inclusion in Record for Prelim. Hearing—(32)
- Mar. 6—Record on Appeal for Preliminary Hearing for Order of Dismissal sent. Cir. Ct.
- Mar. 28—Record on Appeal from Judgm. Order of Dist. Ct. sent Cir. Ct.
- May 17—Filed and entered Mandate (Appellees' Mot. to Dis. granted)—(33)
- June 8—Filed & Ent'd Judgm. on Mandate (Judgm. of Dist. Court affirmed)—(34)
- July 17—Filed Motion, Pltfs., to Vacate Order of 9/18/50 & Judgm. of 6/8/51 & to Remand to Sup. Ct.—(35)
- July 17—Filed Pltfs' Memo in sup. Mot. to Vacate—(36)
- July 17—Filed Notice (7/23)—passed to 8/1—(37)
- July 30—Filed Memo of Defts. in oppos. Motion to Vacate Judgments & to Remand to State Court—(38)
- Aug. 1—Filed Pltfs., Suppl. Memo—(38a)
- Aug. 1—Ent. record hear. Motion of Pltfs. to Vacate Judgments & to Remand—denied.
- Aug. 3—Filed & Ent. Order deny. Mot. to Vacate Judgments & to Remand to State Court (COB 11, 602)—(39)

1951

Aug. 25—Filed Notice, Pltfs., of Appeal (\$5.00)—
(40)

Aug. 25—Filed Bond on Appeal—(41)

Sept. 12—Filed Statement of Pts., Appellants—(42)

Sept. 12—Filed Designation of Record on Appeal—
(43)

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and of Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit I am transmitting herewith all of the original papers and pleadings filed in the above-entitled cause, together with a transcript of the docket entries, included in which are the papers, pleadings and docket entries as required by the Designation of the Record on Appeal of Plaintiffs-Appellants, and the same constitutes the Record on Appeal from that certain Order of the above-entitled Court, filed and entered on August 3, 1951, to the United States Court of Appeals for

the Ninth Circuit at San Francisco. The papers herewith enclosed are identified as follows:

1. Petition for Removal (filed June 23, 1950).
2. Order of Removal (filed June 23, 1950).
3. Bond on Removal (filed June 23, 1950).
4. Summons and Complaint, from Superior Court (filed June 23, 1950).
5. Notice of Removal (filed June 26, 1950).
6. Answer (filed June 29, 1950).
7. Motion to Remand (filed July 5, 1950).
8. Notice of Motion (filed July 5, 1950).
9. Affidavit of Roy A. Hunt (filed July 13, 1950).
10. Affidavit of R. M. Perrin (filed July 17, 1950).
11. Plaintiffs' Memorandum (filed July 31, 1950).
12. Order Denying Motion to Remand and Enjoining Plaintiffs (filed and entered Sept. 18, 1950).
13. Motion for Order of Dismissal (filed Oct. 20, 1950).
14. Defendants' Memorandum on Statute of Limitations (filed Nov. 10, 1950).
15. Notice of Issue (filed Nov. 10, 1950).
16. Affidavit of Service (filed Nov. 10, 1950).
17. Plaintiffs' Memorandum on Statute of Limitations (filed Nov. 18, 1950).
18. Reporter's Transcript of hearing 11/20/50 (filed Nov. 27, 1950).
19. Judgment Order (filed and entered Dec. 8, 1950).
20. Plaintiffs' Notice of Appeal (filed Jan. 9,

1951), with letter of transmittal from James C. Dezendorf to Clerk U. S. Dist. Court at Tacoma, dated Jan. 6, 1951, and marked "received Jan. 9, 1951."

21. Bond for Costs on Appeal (filed Jan. 9, 1951).

22. Statement of Points (filed Jan. 10, 1951).

23. Plaintiffs' Designation of Record (filed Jan. 10, 1951).

24. Defendants' Designation of Additional Portions of Record (filed Jan. 17, 1951).

25. (Copy of Transcript referred to as Item 18 supra).

26. Motion to Extend Time to File Appeal (filed Feb. 1, 1951).

27. Order Extending Time to File Record on Appeal (filed Feb. 1, 1951).

28. Affidavit of James C. Dezendorf (filed Feb. 14, 1951).

29. Defendants' Designation of Additional Portions of Record (filed Feb. 14, 1951).

30. Reporter's Transcript of Proceedings of 2/1/51 (filed Feb. 14, 1951).

31. Designation of Record for Preliminary Hearing (filed Feb. 19, 1951).

32. Designation for Additional Portions of Record for Preliminary Hearing (filed Feb. 19, 1951).

33. Mandate of Circuit Court (filed and entered May 17, 1951).

34. Judgment on Mandate (filed and entered June 8, 1951).

35. Motion to Vacate Order, etc., (filed July 17, 1951).
36. Memorandum in Support of Motion (filed July 17, 1951).
37. Notice of Motion (filed July 17, 1951).
38. Memorandum in Opposition to Motion to Vacate (filed July 30, 1951).
- 38a. Plaintiffs' Supplementary Memorandum (filed Aug. 1, 1951).
39. Order Denying Motion to Vacate Order, etc., (filed and entered Aug. 3, 1951).
40. Plaintiffs' Notice of Appeal (filed Aug. 25, 1951).
41. Bond on Appeal (filed Aug. 25, 1951).
42. Statement of Points (filed Sept. 12, 1951).
43. Designation of Record on Appeal (filed Sept. 12, 1951).

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of Appellants for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal, \$5.00, and that the said amount was paid on August 25, 1951.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court at Tacoma, Washington, this 24th day of September, 1951.

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 13115. United States Court of Appeals for the Ninth Circuit. R. M. Perrin and Mary Perrin, Appellants, vs. Aluminum Company of America and C. S. Thayer, Appellees. Transcript of Record. Appeal from the United States District Court, for the Western District of Washington, Southern Division.

Filed September 27, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13115

R. M. PERRIN and MARY PERRIN,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Defendants

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

The court erred in denying plaintiffs' motion (1) to vacate and set aside the order entered in this action on Septemeber 18, 1950; (2) to vacate and set aside the judgment entered in this action on December 8, 1950; and (3) to vacate and set aside the judgment entered in this action on June 8, 1951, and in refusing to remand this case to the Superior Court of the State of Washington in and for Clark County.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
/s/ JAMES C. DEZENDORF,
/s/ HERBERT H. ANDERSON,
McLEAN & KLINGBERG,
/s/ JOHN YERKOVICH,
Appellants' Attorneys.

[Endorsed]: Filed October 4, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of the record to be contained in the record on appeal in this action:

1. Complaint.
2. Notice of Removal.
3. Petition for Removal.
4. Bond on Removal.
5. Order of Removal.
6. Answer.
7. Motion to Remand.
8. Affidavit of Roy A. Hunt.
9. Affidavit of C. S. Thayer.
10. Affidavit of R. M. Perrin.
11. Findings of Fact and Conclusions of Law on Motion to Remand (if any).
12. Order Denying Motion to Remand.
13. Motion to Dismiss.
14. Judgment Order.
15. Notice of Appeal.
16. Statement of Points.
17. Letter of January 6, 1951, to the Clerk enclosing notice of appeal and bond on appeal.
18. Bond of appeal.
19. Transcript of stenographic notes of hearing before the Honorable Charles H. Leavy, United States District Judge at Tacoma, Washington, on the first day of February, 1951.
20. Order of February 1, 1951, extending the

time within which the record herein shall be filed and the appeal docketed in the Court of Appeals to April 2, 1951.

21. Affidavit of James C. Dezendorf in connection with the mailing of the notice of appeal and bond on appeal.

22. All entries in the Clerk's Civil Docket No. 7, Pages 119 and 120, relating to this action.

23. Judgment on Mandate.

24. Motion to Vacate.

25. Notice of Motion.

26. Order Denying Motion to Vacate.

27. Notice of Appeal.

28. Bond on Appeal.

29. Statement of Points on which Appellant Intends to Rely.

30. Clerk's Certificate to Record on Appeal.

31. This Designation.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH,

Appellants' Attorneys.

[Endorsed]: Filed October 4, 1951.

